Supreme Court of the United States

No. 153.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MYRA CLARK GAINES, APPELLEE.

Circuit Court—District of Louisiana.

BRIEF OF APPELLEE.

J. Q. A. FELLOWS,
Attorney for Appellee.

John W. Madden, Print, 73 Camp st.

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BRIEF OF APPELLEE.

I.

This case grows out of the attempt by the appellee to collect the fruits and revenues of the property decreed to her in 6th Wallace. Five squares of ground had been recovered under that decree. (Rec. pp. 29 and 30). The remaining portion of the large tract of land therein sued for, having being disposed of by the city *pendente lite*, rendered necessary other suits now pending in the Circuit Court against the purchasers, on the same defences originally set up by the city.

The question of fruits and revenues was referred to a Master in Chancery for examination and report (p. 9). The appellee in person conducted the examination (p. 21).

The city was represented by the same able counsel who had attended to its interests through the whole contest.

Testimony was taken at length on both sides (Rec. pp. 21 to 28). The Master reported (Rec. pp. 13 to 21), this report was filed (p. 29) and noticed for trial (p. 91) on the exceptions (pp. 32 and 33) filed by appellant.

The Court ruled on these exceptions to the report of the Master (pp. 92 to 97), and the application for a re-hearing (pp. 97 to 99) was refused (p. 100) and decree entered up in accordance with the opinion of the Court (pp. 100 and 101). From this decree for $125,266 79 the present appeal was taken (p. 101).

The question in the present controversy, is on the ruling of the Judge in Circuit on the various grounds set up in the exceptions to the Master's report and the motion for a re-hearing.

The first twelve pages and that portion from page 35 to 91 (of the printed Record) is immaterial to any question in controversy and does not require further notice.

II.

The exceptions were not made nor were claims preferred before the Master. They should have been dismissed without hearing and the report confirmed.

McMicken vs. Perrin, 18 Howard and 13 Peters, therein referred to. The 83d Rule does not cover such defences as there set up in this case.

III.

Exception was taken before the Court to the report of the Master, that he refused to consider the plea of prescription of three years. The opinion of Mr. Justice Bradley, overruling the exceptions, and the authorities there cited by him (Rec. p. 93, No. 2—) are a sufficient answer to this ground of exception. The Master reported the fact of the plea to the Court, and that he considered "that the Supreme Court had decided that the city had purchased in good faith and that the plea of prescription could not be entertained to defeat complainants recovery of the land * * * it could not be pleaded against her demand for rents and profits. (p. 21.)

Civil Code, Article 3503 is referred to as conclusive on the question of prescription of three years. The words of the Code are, in English, "The action for arrearages of rent charge,

annuities and alimony, or of the hire of movables or immovables * * * are prescribed by three years, unless, &c." The French text is, "L'action en payement des arrerages de rentes perpetuelles ou viagères, ou de pensions alimentaires, ou des loyers ou fermages des biens meubles et immeubles, &c."

The thing sought to be recovered here, is evidently different from that described in the Code—one is the arrears due under a contract of lease—the thing claimed in this proceeding is the amount of damages caused, or rather the amount of the fruits and revenues, not only which were but which might have been made by the possessor in bad faith from the commencement of his possession.

IV.

The other grounds of exception may be summed up in this, that the defendant was entitled to the value of the improvements placed by it upon the property recovered and the rents and profits resulting from such improvements.

This question was argued at length in the Circuit Court on the exceptions, and it is submitted that the reasons of Mr. Justice Bradley is conclusive.—(pp. 93 to 96.)

The question of bad faith was decided in 6 Wall., by this court, as one of the grounds for maintaining the rights and pretensions of this defendant. The authorities cited, go to the full extent that improvements as well as the rent of improvements are due to the real owner where bad faith existed in the defendant at the time his possession commenced.

The appellant made no claim for improvements in the answer to the bill—made no claim before the Master—made none in the exceptions in such shape as to be intelligently acted upon.

In the cases in the Louisiana Reports, where cost of improvements have been allowed, the amount have been deducted from the "rents and revenues" of the whole, the soil as well as the improvements.—16 La. 414; 3 Rob., 138.

Bad faith being the basis of the decree in 6 Wall., the claimant is entitled to payment for fruits and revenues occurring

before the institution of the suit—from the commencement of his posession.

2 Hen. Dig. p. 1195, Nos. 5 and authorities there cited.
Donaldson vs. Hull, 7 N. S. 112.
Lowrey, Curator vs. Irwin, 6 Rob. 192.
Williams vs. Booker et al. 12 R. 256.
Hill vs. Bowden, 3 Ann. 258.
Rhodes vs. Hooper, 6 Ann. 356.

V.

It is asserted in the exceptions that respondent demanded of complainant through the Master that she should make her election of keeping the improvements at the value of the materials and price of workmanship, or require them to be taken away (Rec. p. 33). The Master however states (p. 34), that counsel for respondent only stated to him that they would call upon complainant through him to elect under Art. 500, Civil Code, but did not do so, and he understood them to mean simply to give notice of their intention, but as they had not done so he presumed it had been abandoned.

VI.

It is further stated in the exceptions that the square being used for a place to locate a draining machine, was reserved from sale—withdrawn from commerce and dedicated to public use—(p. 33.) Whatever the conclusions may be from such a statement of the premises; it does not follow that the property was withdrawn from commerce or dedicated to public use, because it was used to erect thereon a draining machine; it was property subject to sale; it was neither a street nor public square; nor dedicated to public use more than any other property used by the City for ordinary municipal purposes; streets are not the property of the Corporation—cannot be sold or devised; the title to them is in the public; so it is with public squares, parks and the like, but not with property used by the Corporation.

VII.

It is also asserted that the property at the time the City took possession, was of little or no value and is now worth from

$1,500 to $2,000 only, and that the City, if liable at all, is only liable for the interest on the value of the profits.

There is no proof of the facts asserted, while the decree is as to the rents and profits, and the Master reported accordingly.

VIII.

The amounts reported by the Master are objected to as "hypothetical, mythical and erroneous;" that he was ordered to report the rents and profits received by the City, whereas the proof was that the City never at any time received rents or profits (p. 32). The City may never have received rents for it never rented the property but used it itself, and hence it can hardly be proper to say that it received no profits. The profits are certainly the amounts it would have had to pay for the use of this or similar property.

But the law does not confine the amount to the rents received by the possessor in bad or good faith even. The revenues are what might have been received; what the property could have brought.

Winter vs. Zacharie, 6 Rob., 468.

The Master reported three amounts for the consideration of the Court as due, under different suppositions of the *law* of the case. The facts were undisputed; they were in proof and are in the record.—Pp. 21 to 28.

On one supposition and which we submit is worthy of consideration, the Master reported the aggregate due by the City of principal and interest for the rents and profits as $499,819 97.—Rec., pp. 14 and 15.

Six witnesses were examined as to the rental value of the property; the average estimate is, per annum, $8000. The rents from July 1st, 1835, to March 1st, 1871, would be $285,333 33, and the interest on this, at 5 per cent., the legal interest in Louisiana, would be $247,266 44, in all $532,599 77; less expenses for repairs as proved, $17,333 33 and interest on same (p. 20) $15,446 47, say $32,779 80, leaving the balance due $499,819 97 as above.

We take it to be beyond dispute that the rents and profits means the rental value of the property, and that it will not avail the defendant not to have derived that profit.

But the counsel say, as they said before the Master, we did not derive the large amount of profit allowed by the Master; to gratify them in this respect, he made another calculation, to show what profit the City actually did derive from the use of the premises (pp. 16 to 18). This was found to be $208,825, actual net profits, derived in all the time from 1835 to 1871, in all 35½ years, and which was reported as another amount which might be allowed the complainant as being the actual profits derived by the City, instead of the actual rental value of $499,819 97.

X.

But the defendant says, we are not satisfied with this, we must be allowed for the use of our machinery, etc.

Mr. Pilie, late City Surveyor, and witness for appellant, says that $2400 per year would be a fair rental of the property, *without the machinery*. On their own basis of calculation then, we find as a final conclusion (pp. 18 to 20) $125,266 79, and this amount the Court allowed.

They have claimed a deduction for use of machinery, and here it is allowed, and the judgment is rendered accordingly. What more could be asked? The conclusion is that this appeal was taken for delay, and the penalty should be inflicted.

All the complaints about the value of improvements is here met at once in the third amount, reported by the Master.

The total rental value of the property and interest as incontestably found (R. p. 15), is $532,599 77. The entire expenses, including cost of buildings, machinery, and everything, even to costs of canals and collection of a drainage tax was, principal and interest, $373,050 00. This would leave $159,549 77. (Printed Record, p. 17.) But from the $373,050 00 should be deducted the three last items of the principal, in all $44,818, and a proportionate amount of interest, say $40,202 87—in all, $85,020 87, which would produce, on the basis as laid down for us by counsel of defendant themselves, $244,570 64 as the net revenues, being the result after deducting all the cost of machinery, building, repairs, and the expenses of running the

same, including interest calculations pro and con, from the gross revenues, as follows:

Net revenue, at $8000 per year—p. 15.....	$532,599 77
Gross costs, improvements and repairs, etc.—p. 17,	288,029 13
Net income, after all deductions, as above	$244,570 64

Instead of $499,819 97, as we claim should have been allowed, and instead of the $125,266 79, as allowed by the judgment on the Master's report.

XI.

Restatement of the Calculations of Net Revenues and Improvements.

The judgment appealed from is for $125,266 79. The Master had made three calculations from the facts found by him as would be determined by three different legal propositions. The legal proposition laid down and apparently undisputed is that the appellee could recover the net fruits and revenues and had claim been made in proper form she would be liable to pay for the cost of the improvements or suffer them to be recovered.

Six witnesses testified to the value of the rental of the property in question ranging from $6000 to $10,000 and averaging $8000 per year, which amounted in principal and interest to $532,599 77. (Printed Record pp. 14 and 15.)

From the evidence of the City Surveyor and from statements taken from the books of his office it appears that the city expended for the improvements and the repairs and expenses of running the Drainage Machine, $151,832 00, the interest on which, taking the proper proportion of that found on p. 17 of Printed Record is $136,197 13, in all $288,029 13. (Printed Record p. 17.)

It follows to a demonstration therefore, allowing the appellant the benefit of every principle of law as invoked (except that of prescription), that the judgment according to the law and facts, should have been for $244,570 64 as due on the 1st March, 1871, and allowing interest from that date on the principal up to date of judgment, 13th June, 1871, of $3,498 71, there was due on that day $248,069 35, instead of $125,266 79 as allowed by the judgment appealed from.

The appellant has therefore no right to complaint but ground to rejoice that no cross appeal has been taken.

THE CALCULATION OF NET RENTS AND PROFITS, in accordance with the foregoing would be as follows:

Value of rental of the Orleans Drainage Machine, computed at average estimate of the six witnesses, at the rate of $8,000 per year. (pp. 14 and 15).		
From 1st July, 1835, to 1s tMarch, 1871, 35 years, 8 months		$285,333 33
Interest on same at legal rate of 5 per cent. per annum		247,266 44
Total rental and interest March 1st, 1871		532,599 77
Less cost of building and running this Draining Machine to 1st March, 1870, including all repairs (p. 17)	$151,832 00	
Interest on above averaged for 35 years to 1st March, 1871, at 5 per cent.	136,197 13	288,029 13
Leaves a net rental after all deductions claimed of		$244,570 64
OR		
Total principal of rental		$285,333 33
Less total cost of improvements, repairs and expenses		151,832 00
Net value of rentals after deducting improvements, &c.		$133,501 33
Interest as above on rentals	$247,266 44	
Less interest on costs of improvements, &c	136,197 13	111,069 31
Total amount due 1st November, 1871		$244,570 64
Add 5 per cent. (legal) interest on the principal $133,506 33, from 1st November, 1871, to rendition of judgment 13th June, 1871, 3 months and 13 days: amount for which judgment might have been rendered 13th June, 1871		3,498 71
Amount over		$248,069 35

On this there is due 6 per cent. interest from June 13th, 1871, the day the judgment was signed, until paid.

XII.

But were it necessary, in order to maintain the judgment rendered, and which under the testimony as shown by the calculations might be doubled, the appellant could be shown not to be entitled to any allowance for the improvements—such is the ruling of the Courts in Louisiana in cases similar to this now under consideration.

Herreot et al. vs. Brousard, 2 N. S. 267.
Lejeune vs. Barrow, 11 Ann., 501.
4 Ann., 145.
3 Ann., 204.

CONCLUSION.

The case on the facts before the Court, is clear for much more than the amount claimed. The value of improvements are allowed, and even if no interest on the net annual revenues had been allowed up to day of judgment, the sum due 1st March, 1871, was $133,501 33; over $8000, more than allowed. Remaining satisfied with the award, we invoke from the Court the full benefit of frivolous appeals, in the way of damages and full interest.

13 Howard, 116.
14 Howard, 328.
Brown vs. Van Braum, 3 D., 344.
3 Peters, 431.
13 Howard, 54.
19 Howard, 66.

And on subject of damages:

22 Howard, 503.
23 Howard, 320 and 455.
3 Wall., 564.

The rule for new trial contained nothing not in the exceptions.

Respectfully submitted,

J. Q. A. FELLOWS,

Attorney for Appellee.

Supreme Court

OF THE UNITED STATES.

THE CITY OF NEW ORLEANS,

Appellant,

against

MYRA CLARK GAINES,

Appellee.

BRIEF FOR APPELLEE.

JAMES EMOTT,

Of Counsel.

NEW YORK:
EVENING POST STEAM PRESSES, 41 NASSAU STREET, COR. LIBERTY.
1873.

Supreme Court of the United States.

THE CITY OF NEW ORLEANS,
Appellant,

vs.

MYRA CLARK GAINES,
Appellee.

Brief for Appellee.

STATEMENT.

This is an appeal by the defendant below, from a decree of of the Circuit Court, for Louisiana, directing the payment to the complainant of $125,266.79, for rents, profits and revenues of property recovered by her, under the decision of this Court (case, fol. 327).

See 6 Wallace, 642.

The decree entered upon the mandate of this Court, will be found at fol. 17, p. 7.

By that decree, a reference was ordered to John B. Weller, Master in Chancery, to take an account of the rents and profits (fol. 23).

The Master reported, March 14, 1871 (fol. 33, p. 13). He reported facts, he also reported certain evidence as taken

before him. He submitted three statements or estimates of damages, or rents and profits, upon three different basis.

That approved by the Circuit Court, and on which the decree was made, was this:

The property in question was not rented by the city of New Orleans, but occupied and used for establishing a draining machine.

This machine reclaimed a large district, gave it value, and made it liable to and productive of taxes.

The land was originally worth $2,000.

The buildings erected by the city, independent of the machinery, cost $18,000.

The fair rental value of the land and building was $2,400 a year.

The expense of repairs was $500 a year.

The Master charged the defendants:

Rental value from July 1, 1835, to Nov. 1, 1870....	$84,800.00
Interest on the rents, at five per cent.....	72,800.00
	$157,600.00

And allowed them:

Expenses of repairs.....	$17,166.66
Interest on repairs.....	15,166.55
	$32,333.31

The Court confirmed the report on this basis, and made a decree for $125,266.79, the difference between those two sums.

The profits to the city, of the drainage machine, were offset against its expenditure in buildings, and that expenditure does not therefore appear as an item in the account.

See opinion of Judge Bradley (fol. 316, p. 96).

The defendant took no objections before the Master (fol. 90, fol. 300). It filed exceptions to his report (fol. 83). These exceptions were heard and argued before Judge Bradley, who, after taking the case into consideration, delivered an opinion, and directed a decree.

See Case, p. 92, fol. 299, *et seq.*

The defendant moved for a rehearing, and argument was again heard (fol. 325).

After further consideration, the rehearing was refused, and a decree entered in conformity with the original decision (fol. 329).

From that decree this appeal is brought.

POINTS.

I.—The defendant was not at liberty to raise, in the Circuit Court, nor can the city ask this Court to consider, exceptions to the report of the Master, which were not presented as objections to the Master before the report.

Story *v.* Livingston, 13 Pet., 359, 366.
McMicken *v.* Periss, 18 How., 507, 510.
Pennington *v.* Lord Muncarter, 1 Mad., 555.
Orley *v.* Pensara, 1 Hare., 322.
Copeland *v.* Crane, 9 Pick., 78.
Byington *v.* Wood, 1 Paige, 145.
Jaege *v.* Bossienx, 15 Grattan, 83.
Gordon *v.* Lewis, 2 Sumn., 143.

The exceptions argued in the Circuit Court were not taken before the Master, and although that Court, as a matter of favor, listened to an argument upon them, it is submitted that this Court will adhere to legal rules and correct practice.

Especially should this be done here, considering that this complainant conducted her own case before the Master, alone, while the defendant was represented by several counsel.

II.—The defendant, the city of New Orleans, was a "possessor in bad faith" of these lands.

The decision of this Court, 6 Wallace, 642, so holds. The decree entered upon the mandate of this Court so adjudges.

See Case, pp. 7, 8, fols., 17, 20.
See Gaines *v.* Hennen, 24 How., 553.
Gaines *v.* New Orleans, 6 Wallace, 642.

III.—Aside from the decree in this case, the defendant was clearly a possessor in bad faith. If this Court can regard this question open, or consider it, it is plain, upon the authorities, that it must re-affirm the decision that the purchase and possion by the city of New Orleans of property to which the complainant had a valid title, as devisee of Daniel Clark, from his executors, without authority, and by a sale which was an entire nullity, was a purchase and possession in bad faith.

Civil Code, Arts. 3414, 3415.
Loury *v.* Erwin, 6 Rob., 194.
Lanfrau *v.* Harper, 13 La. Ann., 548.

IV.—The decree entered by the Circuit Court, in obedience to the mandate of this Court, is the law of the case. It has not been appealed from nor questioned, and no part of it is now open to review. So far as questions were determined by that decree, this prolonged litigation must be treated as ended.

That decree settles—

1. That Myra Clark Gaines is the legitimate child of Daniel Clark.

2. That she is the universal legatee of Daniel Clark.

3. That the sale of the lands in questions from Relf & Chew to Evariste Blanc was null and void.

4. That the city of New Orleans purchased from Evariste Blanc, with full notice that the sale to Blanc was null and void.

5. That Myra Clark Gaines is entitled to the rents and profits of the property from the time that the city of New Orleans came into possession, viz., Sept. 26, 1834, and the city must account for the rents and profits from that period.

6. That an account be taken of such rents and profits from the 26th September, 1834, according to the laws of Louisiana.

This decree itself disposes of nearly all the questions which the appellants are now endeavoring to re-open.

V.—The answer of the city in the original case, which is printed in the present appeal-papers at length, raised numerous questions upon the title and the merits.

It asserted a letter from Relf & Chew, as executors of the will of 1811. Again, as attorneys of Mary Clark; also, certain alleged equities and equitable titles; the invalidity of the probate of the will of 1813; it also set up that the defendant is a purchaser in good faith without notice, and that it is a purchaser from purchasers in good faith without notice; and it pleaded the prescriptions of 5, 10, 20 and 30 years.

All these defences were overruled by this Court. The defendant has been adjudged to have no title, to be a purchaser, with notice of the nullity of its title, and in bad faith, to be therefore entitled to no prescription, and to be accountable for the rents and profits.

The defendant did not anywhere, in its answer, ask to recover its expenditures for improvements against the rents and revenues, or urge anything in bar or diminution of the complainant's claim for these.

VI.—The points presented by the exceptions to the Master's Report, are these :

1. That the limit of the defendant's liability was the loss of the improvements.

2. That the defendant should have been protected in possession of these improvements until the complainant had paid their value, or required their removal, and she should have been compelled to select which.

3. That the law on the subject of allowances to the defendant was not laid down according to the latest decision in Louisiana (16 Ann., 85).

4. That the defendant should have been allowed the benefit of a prescription of three years against the claim for rents.

5. That the defendant had received no rent, income or remuneration, but had expended a large sum for buildings and a draining machine.

6. That the defendant is not liable for any rents, because the property was dedicated by it to the use of the public.

7. That these points were made to the Master, but disallowed by him, and the complainant called to elect, as it was claimed she must, under section 500 of the Code, and because the Master rejected, as evidence, the title by notarial act from E. Blanc, and the answer in this suit.

8. That other lands of the complainant have been greatly benefited by the drainage effected by the machine erected by the city on those lots.

9. That the defendant was erroneously treated as a mere trespasser.

10. That the decree was contrary to law and evidence.
See Case, p. 97, fol. 317.

VII.—The decree under which the reference was had, and the decision of this Court in 6 Wallace, settled the questions that the defendant was liable for rents, and not merely to the extent of losing its expenditures.

The first three sentences of section 500 of the Code have no bearing upon the question of the allowance of rents.

The fourth sentence shows that a possessor in bad faith must be sentenced to make restitution of the fruits.

And it is submitted that a possessor in bad faith is not entitled under the Code to compensation for improvements; certainly not for any which are not both inseparable from the property and necessary to its preservation.

Code, Articles 3413, 3414, 3415, 3416, 3417.
Gibson *v.* Hutchins, 12 La. Ann., 545.
Jenkins *v.* Gibson, 3 La. Ann., 203.
Wood *v.* Lyle, 4 La. Ann., 145.
Hill *v.* Bowden, 3 La. Ann., 258.
Pearce *v.* Frantuns, 16 La., 414, 423.
Herriot *v.* Bronseard, 4 Mart. N. S., 267.

VIII.—A possessor, whether in good or bad faith, is liable for rents and revenues.

If in good faith, it has been said that he is liable only after demand of possession, and for rents or profits actually received or gathered.

But a possessor in bad faith is liable for rents during the whole period of his occupancy.

And for rents and fruits which he might have received or gathered by good management, not merely for the actual income.

Winter *v.* Zacharie, 6 Rob., 466.

IX.—This is the settled rule of the civil law, and no change has been made by the Louisiana Code. The provisions of the Code of 1803 are like those of the present Code, and are declaratory of the civil law.

Dig. Law of Territory, Orleans, 1803, Tit. 11, Ch. 3, Sect. 1, Art. 12.
Justinian Inst., Lib. II., Tit. 1, §§ 29, 30.
Domat, Part 1, B. 3, Tit. V, Sec. 3, 1978, *seq.*
Touillier Livr. 3, Tit. 1, §§ 307, 308, *seq.*
Domat, Part 1, B. 3, Tit. 7, Sect. 4.
Papinian, l., 48 de rei vindicatione.
Rutherford Inst., Nation. Law, B. 1, Ch. XVII., Vol. 1, 391.
Sedgwick on Damages, p. 127.

X.—The report of the Master, and the proceedings in the case, show that the complainant was never required to make her election as called for by the exceptions.

See case, fol. 90, p. 34.

No presumptions will be indulged, nor any latitude allowed to the defendant in such a case as this, where the complainant was conducting the proceedings in person alone, and the defendant was represented by astute and persevering counsel.

No question of election as to the buildings is before the Court. If it were, it would not touch the question of rents. But this is not a case for requiring any such election, or to which any of the rules cited apply. A claim to retain possession until paid for erections, should have been made before the decree in the cause. It would not have been listened to then, but it is in direct conflict with the decree now.

XI.—It is a singular exception or objection to make, that

the Court has not laid down the law according to a particular case. The Federal Courts, when dealing with questions of merely local law, are governed by the rules recognized by the State Courts; but they ascertain those rules from the whole jurisprudence of the State.

In the case of Cannon *vs.* White, 16 Ann., 85, the Supreme Court of Louisiana did not intend to overrule the whole line of decisions on these points. The case of Gibson *vs.* Hutchins, 12 Ann., 545, is cited, and relied upon by the Court in its opinion. The case of Pearce *vs.* Fantum, 12 La., 422, and certain other cases, are overruled expressly in Gibson *vs.* Hutchins, so far as they hold that a squatter on public lands is a possessor in good faith. But the rules that a possessor in bad faith is chargeable with rent from the date of his occupation, and with fruits, according to what he might have realized, are not questioned. The only point upon which doubt is cast by the decision in Cannon *vs.* White is, whether a possessor in bad faith is entitled to compensation for improvements. It is submitted that the case is not precise and distinct enough upon that point to overrule all the previous decisions.

XII.—But this case was decided in accordance with the rule supposed to be asserted in Cannon *vs.* White. The defendant was allowed for its improvements as well as for its repairs, and in a method entirely analogous to that recognized in Cannon *vs.* White.

The Court charged the defendant with what the use of the property was worth—$2,400 per annum—with interest on that rental.

The Court allowed to the defendant its expenditures for repairs $500 per annum, with interest.

The cost of the buildings—$18,000—was estimated, and allowed, but was held to be offset by the benefits, profits and advantages derived by the city from the use of the property for its machinery, whereby its revenues were largely, though indirectly, increased.

The principle announced by Judge Bradley on this point (see fol. 316) is the same upon which the Supreme Court of Louisiana acted in Cannon *vs.* White, as well as in the other cases cited.

It leaves, in effect, but one question in the case, which is, whether the benefits, advantages, and profits derived by the city of New Orleans from the use of these premises for its draining machinery can be offset against the claims for rent.

Such equitable allowances are constantly made in the courts of Louisiana. It was so done in the case cited as the most recent exposition of the law by the counsel for the city.

Cannon *vs.* White, 16 La., Ann., 85.
Hill *vs.* Bowdin, 3 Ann., 258.

XIII.—The defendant was properly held liable for the rents and profits since its occupation; no prescription could avail to bar the claim of the plaintiff in this case.

1. This is not a suit for rent under a lease or hiring, but a proceeding under a decree or judgment in a pending action to recover rents, revenues and fruits. The proceeding is to be regarded as pending, and any prescription must be applied as from the time of the commencement of the original suit, and not from the date of the decree or the reference under it.

2. The prescription of three years (Art. 3503) applies to actions for rent reserved by contract only. The whole section relates to actions upon contracts.

3. The whole question of prescription was settled by the decision of this Court, and the decree in this case. No plea of prescription could be interposed by the defendant, according to the terms or the spirit of that decision and decree. The defendant was determined and adjudged a possessor in bad faith, and liable to account for the rents

and revenues of the property, as possessors in bad faith are liable under the laws of Louisiana. The question of prescription was met in the outset of these cases. If the defendant was not liable for these rents from the commencement of its possession, it would be for reasons which would have created a bar to the action. On the other hand, if the action was sustained, the right to the rents and revenues from the date of occupation follows :

Gaines *vs.* Hennen, 24 How., 308.
Gaines *vs.* New Orleans, 6 Wall., 717.
Green *vs.* Riddle, 8 Whea., 1.
Bright *vs.* Boyd, 1 Story Rep., 478.
Putnam *vs.* Ritchie, 6 Paige, 390.

XIV.—The defendant is liable not only for rents actually received or collected by it from tenants, but for all which might have been collected for the value of the use of the property.

Domat Winter *vs.* Zacharie, 6 Rob., 466, § 2181.
Touillier Livr., 3 Tit. 1, § 307, *seqq.*

But the rents charged by this decree were actually and beneficially received by the city. The fact that the city used and enjoyed the property, instead of renting and collecting rents for it, obviously can make no difference as to the fact or the extent of liability. The only consequence is that the city is liable for the fair annual value, instead of the rent collected, or which might have been collected from tenants. And the report of the Master, in effect, establishes that if the city had chosen to lease the premises instead of using them, it could have obtained an annual rent of $2,400.

XV.—The question of the allowance of interest is not raised. It was not made before the Master, or before the Court below.

But interest on rents due or collectable at definite times is properly allowable, and interest was computed by the Master in this case in favor of both parties.

See Jackson *vs.* Wood, 24 Wend, 443.

XVI.—It would be no answer to the complainant's claim, if the property had been dedicated to public use. Private property cannot be taken for public use temporarily or permanently without compensation.

But this property was not dedicated to public use. It was acquired and used by a municipal corporation for its own use, and to enhance its revenues.

XVII.—The claim of the city to recoupe against the value of the use or rent of the property, benefits received by the complainant from the drainage of other lands, is wholly imaginary. There is no evidence upon which any such allowance could be made or settled; there is no plea or claim of any such allowance, and it is not admissible. All the equities arising out of the use and benefit of the draining were considered by the Court upon the question of the adjustment between the parties of the claim for the value of the improvements.

XVIII.—The remaining points as to the conduct of the reference, the alleged duty of the complainant to elect whether the buildings should be removed, and the rule of damages applied to the case, are either matters of practice, or were obviated at the hearing in the Circuit Court, or have been considered and answered in this brief.

XIX.—The Court below properly charged the defendant with the value of the use of the property in its actual condition as improved and used by the city.

1. The defendant is either entitled to an allowance for the improvements and erections put upon the property, or not so entitled.

If not so entitled, then these erections wrongfully put upon the property of another became at once part of that property. The complainant was entitled to possession at the time when the defendant went actually into occupation and at every moment since. This right to possession carried with it the right to all the structures on the property, whether placed there by the defendant or not. From the time when we were entitled to possession we were entitled to the value of the use. Our rights are not prejudiced by delay, if it be not long enough to create prescription. From the time when this suit was commenced the delay was wholly caused by the defendant itself, who resisted our claim, and that, too, without claiming in its answer any allowance either for the improvements and erections or their use. The judgment of this Court and the decree entered on its mandate establishes that we were entitled to possession of the property, and that the defendant ought to have surrendered it to us when demanded. Demand was made long before the present suit. This suit was brought December, 1856.

Certainly, the defendant cannot refuse to surrender our property whether improved or with erections by it or not, and refuse to pay us the value of the use, and so by an unjust litigation entitle itself to profits from its use, while it is protracting that litigation.

Clearly, if we are entitled to the property without any drawback as compensation for erections and improvements, we have also the right to its rents or to the full value of its use from the time when we ought to have obtained the possession.

2. If, on the other hand, we are bound to make compensation, then that compensation is made as of the date of the erections and improvements, and on making such compensation we are entitled to the full value of the property ever since.

We claim, as the Court below decided, that the benefits and

advantages from the use of the premises for drainage, were sufficient to compensate the defendant for its buildings and erections. If this be so, then having paid for the buildings we are entitled to the value of their use, or rather the value of the property as improved by them.

If these benefits and advantages were not a sufficient or rightful offset to these expenditures, the Court may amend the decree by making a proper allowance.

But, either way, where we have been charged with the expense of these structures, as of the date of their erection, we are entitled to the value of their use, or that of the property, with these structures upon it, during all their enjoyment by the city.

The law seeks to place both parties where they ought to have been, and would have been, if both had had their rights and complied with their obligations from the beginning. If this had been done, and if we were bound to compensate for improvements, we should have paid for these buildings when they were completed; but then we should have had possession of them, and the benefit of the income from them from the same time.

3. The city of New Orleans was directed by the decree of the Circuit Court, from which there is no appeal, to account for and pay all the rents and profits accruing from the property since the 26th September, 1834, and it was referred to the Master, to state an account of such rents, according to the laws of Louisiana. (Case, fols. 21, 22, 23.)

This settles the extent and limit, both as to the time and character of the liability of the city. And having been adjudged a possessor in bad faith by the law of Louisiana, the city is liable for rents from the time of its taking possession, and for all which it might have gathered, or which the property, as it was improved, was worth.

The authorities cited by Judge Bradley, and the whole current of Louisiana decisions, show that the rule is settled in that way under the civil law in that State.

Pearce *v.* Frantum, 16 La., 414, 424.
Kellam *v.* Rippey, 3 Rob., 138.
Lowry *v.* Erwin, 6 Rob., 194.
Gibson *v.* Hutchins, 12 La. Ann., 545.

4. It will be observed that this is not a case where compensation is claimed for what might have been realized from the property, or for the fruits which might have been gathered by good management.

The city of New Orleans, knowing the viciousness of its title, erected buildings on this property, knowing it was ours. It has used and enjoyed these buildings, and reaped a direct and positive gain from the use of our property, thus improved, to the extent of $2,400 per annum. The case is precisely the same in principle and upon the present question as if the property had been leased for that rent. If the city is not held accountable for these rents, it will reap a benefit from an unlawful act. The question whether the true owner should make compensation for these improvements is a distinct question. However that may be determined, we have a right to the value of the use of the property as it is, and as it has been, during the occupation. There is no rule or principle upon which the rent can be apportioned or divided.

XX.—We respectfully submit that the whole case is narrowed to the question whether the Court below was justified in deciding that the benefit and advantage derived by the city of New Orleans from its drainage machinery were sufficient compensation for its expenditures in buildings and erections.

We submit that the decision of the Circuit Court upon the question was correct in law and in fact, and that its decree should be approved.

JAMES EMOTT,
Of Counsel for Appellee.

Code 1808 - p 104
p 478 - art. 23 -

Art. 2604
Code 1825 -

36 Miss R 639 -
647

11 La An 335 -

3 Martin & Yerger -
Hunter v. Shearer -